A **MALAYSIA SMELTING CORPORATION BHD**

v.

PEMUNGUT DUTI SETEM, PULAU PINANG

B COURT OF APPEAL, PUTRAJAYA
TENGKU BAHARUDIN SHAH JCA
T SELVENTHIRANATHAN JCA
ABDUL WAHAB PATAIL JCA
[CIVIL APPEAL NO: P-01-105-2007]
C 26 MAY 2010

REVENUE LAW: *Stamp duty - Assessment - Appeal against - Agreement for sale of shares - Whether stamp duty assessed on par value of shares or on purchase price of shares - Stamp Act 1949, ss. 13(1)(b), 33, First Schedule item 32(b)*

D This was the appellant's appeal against the decision of the High Court dismissing its appeal by way of case stated under s. 39 of the Stamp Act 1949 ('Act'). Pursuant to a sale of shares agreement, Anggun Pintas Sdn Bhd sold its holding of 97,232,142 E issued RM1 par value ordinary shares in Rahman Hydraulic Tin Sdn Bhd ('said shares') to the appellant, with consideration payable for the said shares amounting to RM15,000,000. The respondent assessed the stamp duty at RM291,699 based on the F par value of the said shares (RM97,232,142), whereas the stamp duty would have amounted to only RM45,000 if assessed on the purchase price (RM15,000,000). The questions requiring determination were: (i) whether the par value of RM1 per share (or RM97,232,142 for the entire paid-up capital) of the company G was the actual value of the company's shares at the date of the transfer; (ii) if not, what the value of the company's shares at the date of the transfer was; and (iii) what the duty chargeable for the transfer of the company's 97,232,142 ordinary shares at the consideration of RM15,000,000 was.

H **Held (allowing the appeal with costs, and setting aside the High Court's judgment)**
Per Abdul Wahab Patail JCA delivering the judgment of the court:

I **(1)** The part of the first question pertaining to par value must be answered in the negative as par value is only a face value while the value of a company waxes and wanes, among other

things, according to its performance and outlook. In this instance, Anggun Pintas had conducted an open tender exercise for the sale of the said shares, being the entire paid-up capital of Rahman Hydraulic. The appellant's tender to purchase the said shares for RM15,000,000 was accepted, and there was no evidence of anyone else willing to pay more than RM15,000,000, let alone RM97,232,142, for Rahman Hydraulic with its remaining mining rights and related mining assets. (para 15)

(2) A valuation is an estimate based on records of previous similar transactions, the acid test of value being the price obtained in an arms length transaction between a willing buyer and a willing seller who are not otherwise obliged or pressed to buy or sell. The provision is item 32(b) of the First Schedule of the Act as to value on the date of the transfer and not under s. 13(1)(b) of the Act which applies to the instrument of the shares. Given that there was no dispute raised as to whether the open tender sale was at arms length or whether Anggun Pintas was hard-pressed to sell, and there being no evidence that the value of the shares at the date of the transfer was more than at the time of purchase, the answer to the second question was that the best available evidence of the value of Rahman Hydraulic's shares on the date of the transfer was the purchase price of RM15,000,000. (para 17)

(3) The answer to the third question followed from the answers to the first and second questions. (para 18)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan perayu terhadap keputusan Mahkamah Tinggi menolak rayuannya melalui kes yang dinyatakan di bawah s. 39 Akta Setem 1949 ('Akta'). Mengikut suatu perjanjian jualan saham, Anggun Pintas Sdn Bhd menjual pemegangannya atas 97,232,142 saham biasa tara RM1 yang dikeluarkan dalam Rahman Hydraulic Tin Sdn Bhd ('saham tersebut') kepada perayu, dengan balasan yang perlu dibayar bagi saham tersebut berjumlah sebanyak RM15,000,000. Responden mentaksirkan duti setem sebanyak RM291,699 berdasarkan tara saham tersebut (RM97,232,142), sementara duti setem akan berjumlah hanya RM45,000 jika ditaksirkan berdasarkan harga belian (RM15,000,000). Soalan-soalan yang perlu ditentukan adalah: (i) sama ada tara RM1 setiap

saham (atau RM97,232,142 untuk keseluruhan modal yang sudah dibayar) syarikat adalah nilai sebenar saham syarikat pada tarikh pindahan; (ii) jika tidak, apakah nilai saham syarikat pada tarikh pindahan; dan (iii) apakah duti dikenakan cukai bagi hantaran 97,232,142 saham biasa syarikat pada balasan RM15,000,000.

Diputuskan (membenarkan rayuan dengan kos, dan mengenepikan penghakiman Mahkamah Tinggi)
Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:

(1) Bahagian soalan pertama berhubungan dengan tara mesti dijawab secara negative kerana tara hanya merupakan nilai muka sementara nilai sebuah syarikat turun naik, antara lain, menurut prestasi dan pandangannya. Dalam kes semasa, Anggun Pintas telah melakukan pelaksanaan tender terbuka bagi jualan saham tersebut, iaitu keseluruhan modal Rahman Hydraulic yang sudah dibayar. Tender perayu untuk membeli saham tersebut pada harga RM15,000,000 telah diterima, dan tiada keterangan bahawa terdapat orang lain yang sanggup bayar lebih dari RM15,000,000, lebih-lebih lagi RM97,232,142, untuk Rahman Hydraulic dengan hak-hak lombong yang tinggal dan aset-aset berkenaan.

(2) Suatu penilaian adalah satu anggaran berdasarkan rekod-rekod transaksi serupa sebelum itu, dengan batu uji nilai merupakan harga yang diperolehi dalam suatu transaksi berjauhan di antara pembeli dan penjual yang masing-masing rela dan yang tidak diwajibkan atau ditekan untuk membeli atau menjual. Peruntukannya ialah item 32(b) Jadual Pertama Akta mengenai nilai pada tarikh pindahan dan bukan di bawa s. 13(1)(b) Akta yang terpakai kepada instrument saham. Oleh kerana tidak ada pertikaian yang timbul akibat sama ada tender terbuka adalah secara berjauhan atau sama ada Anggun Pintas ditekan untuk menjual, dan kerana tiada keterangan yang nilai saham pada tarikh pindahan adalah lebih dari pada masa pembelian, jawapan kepada soalan kedua ialah keterangan paling bagus yang ada tentang nilai saham Rahman Hydraulic pada tarikh pindahan adalah harga belian tersebut sebanyak RM15,000,000.

(3) Jawapan kepada soalan ketiga berikutan dari jawapan-jawapan kepada soalan-soalan pertama dan kedua.

Case(s) referred to:

Hatrick v. Commissioner of Inland Revenue; Public Trustee v. Commissioner of Inland Revenue [1963] NZLR 641 ***(refd)***

Union of India v. Kulu Valley Transport Ltd & Others [1958] 28 Comp Cas 29 ***(refd)***

Legislation referred to:

Stamp Act 1949, ss. 13(1)(b), 39, First Schedule, item 32(b)

For the appellant - Ghazi Ishak (G Arumugam with him); M/s Ghazi & Lim
For the respondent - Norhisham Ahmad (Noor Faezah Zainodin with him); Inland Revenue Board

[Appeal from High Court, Pulau Pinang; Originating Motion No: 25-67-2005 (MT1)]

Reported by Suresh Nathan

JUDGMENT

Abdul Wahab Patail JCA:

[1] The appellant Malaysia Smelting Corporation Berhad ("the appellant") appealed against the dismissal with costs of its Appeal by way of Case Stated pursuant to s. 39 of the Stamp Act 1949 (Act 378) through its Originating Motion MT1-25-67-2001 dated 18 August 2005.

The Case Stated

[2] Pursuant to a Sale of Shares Agreement dated 1 October 2004, Anggun Pintas Sdn Bhd (In Creditor's Voluntary Liquidation) sold its holding of 97,232,142 issued RM1 par value ordinary shares in Rahman Hydraulic Tin Sdn Bhd ("the said Shares") to the appellant.

[3] The consideration payable for the said Shares under the Sale of Shares Agreement was Ringgit Malaysia Fifteen Million (RM15,000,000) only (hereinafter referred to as "the Purchase Price").

[4] The respondent Pemungut Duti Setem, Pulau Pinang assessed the stamp duty on the Share Transfer Form dated 22 November 2004 at RM291,699 based on the par value of the said shares of RM97,232,142. Whereas, if assessed on the purchase price, the stamp duty would have amounted to RM45,000 only.

[5] The questions for determination by the learned judge were set out as follows:

a) Whether the par value of RM1 per share (or RM97,232,142 for the entire paid-up capital) of the company is the actual value of the company's shares at the date of the transfer?

b) If not, what is the value of the company's shares at the date of the transfer?

c) What is the duty chargeable on the Share Transfer Form dated 22 November 2004 for the transfer of the 97,232,142 ordinary shares of the company at the consideration of RM15,000,000?

[6] In plain and simple terms, the question is whether stamp duty is assessed on a) the par value; b) the actual consideration or purchase price of the shares in Rahman Hydraulic Tin Sdn Bhd on the sale and purchase; or c) the value on the date of transfer of the said shares.

[7] The relevant provisions of the Stamp Act 1949 (Act 378) are as follows:

a. Section 13(1)(b):

> Where an instrument is chargeable with ad valorem duty in respect of
>
> (b) any stock or marketable or other security, the duty shall be calculated on the value, on the date of the instrument of the stock or security according to the average price thereof or, if there be no price, according to the value thereof.

b. Item 32(b) of the First Schedule:

> On sale of any stock, shares or marketable securities, to be computed on the price or value thereof on the date of the transfer, whichever is the greater.
>
> For every RM1,000.00 or fractional part of RM1,000.00 RM3.00.

[8] Section 13(1)(b) helpfully provides that in the case where an instrument is chargeable with ad valorem duty, value is calculated upon the average price on the date of the instrument if there is a price, but if there is no price, then according to the value thereof.

[9] Item 32(b) of the First Schedule concerns the duty chargeable on the date of the transfer. It provides that it is to be computed on the price or value thereof, on the date of the transfer, whichever is the greater.

[10] The term "*ad valorem* duty" simply means duty that varies based upon the value of the product, services or property, in this case the shares, on which it is levied. Therein lies the problem, for unlike cost which can be determined with some precision, price and value are, for want of a better description, fluid and subjective. Price and value may vary at different times. The value of the same item may be much more to one person than to another. The price one might pay may not represent good value. *Prima facie*, the price is not always necessarily the value.

[11] Before proceeding further, it is necessary to be very clear what is it that stamp duty is being assessed on.

[12] Pursuant to the Pengurusan Danaharta Nasional Berhad Act 1998, Special Administrators were appointed over Rahman Hydraulic Tin Sdn Bhd to prepare what is known as a "Workout Proposal". Pursuant to the workout proposal, Anggun Pintas Sdn Bhd was incorporated as a special purpose vehicle to hold the entire paid-up share capital of Rahman Hydraulic Tin Sdn Bhd while all the liabilities and the non-mining related assets of Rahman Hydraulic Tin Sdn Bhd were transferred to the special purpose vehicle as at 21 April 2004. Thereafter, the only assets remaining in Rahman Hydraulic Tin Sdn Bhd were the mining rights and related mining assets.

[13] What it means is that the RM97,232,142 paid into Rahman Hydraulic Tin Sdn Bhd for 97,232,142 of its issued shares at RM1 par value had been basically expended and what remains are: (a) the value of the mining rights and related mining assets remaining in Rahman Hydraulic Tin Sdn Bhd; and (b) of non-mining related assets transferred into Anggun Pintas Sdn Bhd (In Creditor's Voluntary Liquidation) less all the liabilities of Rahman Hydraulic Tin Sdn Bhd. Having moved the non-mining assets and the liabilities out of Rahman Hydraulic Tin Sdn Bhd, what remained in Rahman Hydraulic Tin Sdn Bhd were its mining rights and related mining assets when it was sold by selling its 97,232,142 issued shares. The par value of the issued shares of Rahman Hydraulic Tin Sdn Bhd may be RM97,232,142, but the 97,232,142 represents the remaining value of Rahman Hydraulic Tin Sdn Bhd.

[14] That brings us back to the question put before the High Court and now before this court in this appeal.

[15] That part of the first question as pertains to par value must be answered in the negative, for the reason that par value is only a face value while the value of a company waxes and wanes, amongst other things, according to its performance and outlook. In this case, Anggun Pintas Sdn Bhd had conducted an open tender exercise for the sale of the said Shares being the entire paid-up capital of Rahman Hydraulic Tin Sdn Bhd. The appellant's tender to purchase the said Shares for RM15,000,000 was accepted. There is no evidence put before the Court of anyone else willing to pay more than RM15,000,000 let alone RM97,232,142 for Rahman Hydraulic Tin Sdn Bhd with its remaining mining rights and related mining assets.

[16] As to the second question, it must be borne in mind the shares of a company represent units of shareholding in a company. The value of each share is the value of the company divided by the number of shares issued. There are various approaches to determination of the value of a company. The three most widely-accepted approaches are the comparable worth method, the asset valuation method, and the financial performance method, whichever is appropriate in the circumstances of the particular case. There being no evidence of any comparable company and its valuation placed before the court, and since Rahman Hydraulic Tin Sdn Bhd is not a going concern with an income stream or bright business outlook, only asset valuation remains.

[17] A valuation is an estimate based on records of previous similar transactions, the acid test of value is the price obtained in an arms length transaction between a willing buyer and a willing seller who are not otherwise obliged or pressed to buy or to sell. See *Hatrick v. Commissioner of Inland Revenue; Public Trustee v. Commissioner of Inland Revenue* [1963] NZLR 641; *Union of India v. Kulu Valley Transport Ltd & Others* [1958] 28 Comp. Cas. 29 Punjab High Court. The provision is Item 32(b) of the First Schedule as to value on the date of the transfer and not under s. 13(1)(b) which applies to the instrument of the shares. Given that there is no dispute raised whether the open tender sale was at arms length or not, or whether Anggun Pintas Sdn Bhd is hard pressed to sell, and there being no evidence put before the court that the value of the shares at the date of transfer is more than at the time of purchase, the answer to the second question is that

the best available evidence of value of the shares of Rahman Hydraulic Tin Sdn Bhd on the date of transfer is the purchase price of RM15,000,000.

[18] The answer to the third question follows from the answers above to the first and second questions and need not be spelled out.

[19] Accordingly, we had allowed the appeal with costs and set aside the judgment of the High Court.